STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross Appellant,	UNPUBLISHED November 17, 2011
v	No. 299834 Oakland Circuit Court
DENNIS LYNN WILSON, Defendant-Appellant/Cross Appellee.	LC No. 2010-230287-FC

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, assault with intent to commit great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.13, to serve concurrent prison sentences of 15 to 65 years for armed robbery and five to 15 years for the assault conviction and felon in possession conviction. Those sentences were to be served consecutively to three concurrent two-year terms for felony-firearm. Plaintiff cross-appeals, challenging the scoring of offense variable ten of the sentencing guidelines. We affirm defendant's convictions and sentences.

The victim, Dwight Alexander, was familiar with defendant through a mutual acquaintance, Kiana Harvin. On the day of the incident at issue, Alexander agreed to give defendant a ride to a nearby store. Alexander testified that defendant drew a weapon and demanded cash from him after returning to Harvin's residence. Alexander moved to leave the vehicle and defendant, who had been sitting in the seat immediately behind Alexander's driver seat, attempted to grab him and ultimately shot Alexander in the knee. Alexander fell out of the vehicle and made his way to a house across the street; while doing so, he looked back and saw defendant and his companion rifling through his belongings. Alexander discovered that an expensive watch and a gaming system were missing from his vehicle. The responding officer obtained a description from the victim, and shortly thereafter, defendant was arrested.

First, defendant argues that he was denied due process and a fair trial because the prosecution failed to test his clothing for gunpowder residue, and that his trial counsel rendered ineffective assistance by failing to secure such testing. We disagree.

A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt as to the defendant's guilt. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Defendant argues the prosecution had an affirmative duty to test the jacket he was wearing when he was arrested for traces of gunpowder residue. However, "[n]either the prosecution nor the defense has an affirmative duty to search for evidence to aid the other's case." *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995). The police or prosecution may elect to forgo the testing of some evidence without affecting a defendant's due process rights, so long as such decision does not constitute an attempt to suppress evidence, intentional misconduct, or bad faith. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). There is a distinction between the failure to disclose evidence and the failure to develop evidence, and this Court has noted the failure to run tests is more likely to injure the prosecution's case than the defendant's because the burden of proof lies with the former. *People v Stephens*, 58 Mich App 701, 705; 228 NW2d 527 (1975). The *Stephens* Court concluded that a failure to run fingerprint tests was a "legitimate police investigative decision" that did not violate the defendant's rights. *Id*. at 706. The failure to test defendant's jacket for gunpowder residue can similarly be characterized as a legitimate investigative decision.

And defendant's unpreserved claim that his trial counsel rendered ineffective assistance by failing to secure the testing is without merit. Our review of unpreserved claims of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To prevail on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Our review of the record indicates that trial counsel's failure to seek gunpowder testing was a strategic decision. Specifically, trial counsel's questions during cross examination of the arresting officer had the effect of criticizing the decision made by the investigating officers to not conduct the test. The fact that a trial strategy is ultimately unsuccessful does not necessitate the conclusion that counsel was ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Moreover, defendant's claim that trial counsel should have personally arranged for testing when the prosecution failed to do so is without merit. A criminal defendant may request appointment of an expert if he or she can demonstrate that there is a nexus between the facts of

the case and the need for an expert. MCL 775.15; *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). However, "[i]t is not enough for the defendant to show a mere possibility of assistance from the requested expert." *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). Instead, a defendant must show that he "cannot proceed safely to a trial" without the proposed expert witness. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). In light of the testimony that this type of testing is unreliable, we do not conclude that defendant was unable to proceed safely to trial without it.

Next, defendant argues that trial counsel rendered ineffective assistance by failing to thoroughly cross examine the robbery victim. We disagree.

Decisions related to the questioning of a witness are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). A review of the record demonstrates that defense counsel highlighted some inconsistencies in Alexander's testimony. In addition, defense counsel elicited testimony from Alexander indicating that the prosecutor provided him with a copy of the preliminary examination transcript and encouraged Alexander to testify consistently at trial. In light of this testimony, it appears defense counsel's failure to further explore inconsistencies in the witness' testimony was a strategic decision.

Next, defendant argues that counsel rendered ineffective assistance by failing to object to the in-court identification of defendant made by an eyewitness. We disagree.

An identification procedure violates a defendant's right to due process of law when it is "unnecessarily suggestive and conducive to irreparable misidentification." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). When a pretrial identification procedure is unduly suggestive, the witness' in-court identification will not be allowed at trial unless an independent basis sufficient to purge the taint of the improper pretrial identification exists. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Defendant asserts that the police conduct of returning him to the scene of the shooting to be identified by the eyewitness was highly suggestive. However, prompt, on-scene identifications are permissible, and are "reasonable, indeed indispensible, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance." *People v Winters*, 225 Mich App 718, 727-728; 571 NW2d 764 (1997). Thus, defendant's claim that the pretrial identification procedure was highly suggestive fails.

Next, defendant argues that he is entitled to resentencing because the sentencing guidelines were incorrectly scored. We disagree.

A trial court's scoring decisions are reviewed for an abuse of discretion and to determine whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Unpreserved allegations of sentencing error are reviewed for plain error affecting the defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). Defendant's claims related to offense variable (OV) OV 3 and OV 4 are not preserved, while his claims that OV 14 and OV 19 were misscored are preserved.

Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range as determined by the OV and the prior record variable points assigned to the defendant. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993). A scoring decision for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

As an initial matter, we reject defendant's claim that his sentence is constitutionally barred by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and its progeny. Our Supreme Court has consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *McCuller*, 479 Mich at 683; *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Defendant recognizes as much, but argues that this line of cases was wrongly decided. However, we are bound to follow the decisions of our Supreme Court. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

Offense variable 3 is scored for the degree of physical injury to a victim and calls for the assessment of 25 points when a life threatening or permanent injury occurred to the victim. MCL 777.33(1)(c). Defendant fails to recognize that it is not necessary to show that the victim's life was in danger if a permanent injury occurred. Here, Alexander testified the shot split his tibia in half. He stated that he has undergone numerous surgeries, continues to require crutches to walk, and likely will not regain full use of his leg. In addition, Alexander now suffers from a nerve disease. Sufficient evidence supported the trial court's scoring of OV 3. See *Hornsby*, 251 Mich App at 468.

A sentencing court must assess ten points under OV 4 if the victim sustained serious psychological injury that may require professional treatment, although treatment need not actually be sought in order for these points to be assessed. MCL 777.34(2). Alexander testified at trial that he was "frightened for [his] life" at the time of the robbery. In addition, the "victim's impact statement" portion of the presentence investigation report indicated that Alexander "is depressed on a daily basis, can't sleep and feels that he needs counseling." Sufficient evidence existed to uphold the scoring decision. See *Hornsby*, 251 Mich App at 468.

Ten points must be assessed under OV 14 when the trial court determines the offender "was leader in a multiple offender situation." MCL 777.44(1)(a). Here, two men were involved in the robbery even though only defendant was arrested. Defendant does not dispute that this case involved a multiple offender situation, but instead argues the evidence demonstrates that the other gunman was the leader. This argument is not persuasive, given that Alexander testified that it was defendant who pointed the gun, demanded money, tried to go into his pockets, and ultimately shot him. In contrast, Alexander indicated that the second man was armed, but also stated that the second man did not point the weapon at him.

Offense variable 19 requires that ten points be assessed when an offender interferes or attempts to interfere with the administration of justice. MCL 777.49(c). Defendant was assessed

ten points under this OV based on his attempt to flee from police on the day of the shooting. Defendant argues this assessment was improper under *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), which held that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *Id*. at 133. Defendant argues that because the sentencing offense, armed robbery, had been completed prior to his conduct of fleeing from police, he should not have been assessed points under this variable. However, in *People v Smith*, 488 Mich 193; 793 NW2d 666 (2010), our Supreme Court concluded that OV 19 may be scored for conduct that occurred after the completion of the sentencing offense. *Id*. at 195. Accordingly, defendant is not entitled to resentencing on this basis.

On cross-appeal, the prosecution argues that the trial court incorrectly assessed zero points for OV 10 because 15 points should have been assessed; therefore, resentencing is required. We disagree.

Offense variable 10 relates to exploitation of a vulnerable victim and requires an assessment of 15 points if "predatory conduct was involved." MCL 770.40(1)(a). Predatory conduct is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 770.40(3)(a). Our Supreme Court, in *People v Huston*, 489 Mich 451; 802 NW2d 261 (2011), recently explained that "predatory conduct" does not

> describe *any* manner of "preoffense conduct." Indeed, if that were the case, 15 points could be assessed under OV 10 in almost *all* cases because there will almost always be some manner of preliminary or "preoffense conduct." Few criminal offenses arise utterly spontaneously and without forethought. Most importantly, reading MCL 777.40(1)(a) as requiring 15 points to be assessed for OV 10 in *every* case would essentially render nugatory MCL 777.40(1)(b) through (d) . . . .
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> Thus, to give meaning to the entirety of MCL 777.40(1), and out of recognition that 15 points for "predatory conduct" constitutes the highest number of points available under OV 10 and that "preoffense conduct" is being used to define "predatory conduct," we conclude that the latter term does not encompass *any* "preoffense conduct," but rather only those forms of "preoffense conduct" that are commonly understood as being "predatory" in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or "preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape with detection." *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008). [*Huston*, 489 Mich at 462.]

In this case, defendant's preoffense conduct was not what is commonly understood as being "predatory" in nature; rather, it appears that defendant merely took advantage of the opportunity to commit a crime after "run-of-the-mill planning." See *id*. Thus, we reject the prosecution's claim on cross-appeal.

Defendant also argues in a Standard 4 brief that he was denied the effective assistance of counsel because the statutory requirements for the issuance of an arrest warrant were not complied with in this case. This claim is without merit.

Defendant's argument is premised on the assertion that the warrant issued for his arrest was unconstitutional for failure to comply with MCL 764.1a and MCR 6.102(C)(4). It is true that for a valid warrant to issue it must be properly signed by a neutral and detached magistrate. *Shadwick v Tampa*, 407 US 345, 350; 92 S Ct 2119; 32 L Ed 2d 783 (1972). However, defendant was not arrested pursuant to a warrant. Instead, he was arrested following a police pursuit immediately after the commission of the felony for which he was charged. A police officer may make an arrest without a warrant if there is probable cause to believe that a felony was committed by the defendant. MCL 764.15.

Defendant further argues in his Standard 4 brief that the trial court erred in denying his motion for a directed verdict related to the charge for armed robbery and the corresponding charge of felony-firearm. We disagree.

An appellate court reviews a trial court's decision on a motion for directed verdict to determine whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008). The essential elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence, (3) while the defendant was armed with a weapon described in the statute. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). Here, defendant challenges only the sufficiency of the second element. Defendant highlights the fact that Alexander did not personally hand over any property and did not actually see his belongings in defendant's possession. Defendant also notes that Alexander's watch and gaming system were not found in the area defendant traveled during the chase.

"Circumstantial evidence and the reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Alexander testified that certain property was present in his vehicle on the day that defendant demanded cash from him and that, when Alexander was getting away after being shot, he saw his vehicle being searched. A police inventory of the items inside Alexander's vehicle prepared shortly thereafter did not include those items. A reasonable inference from this evidence is that those items were taken by defendant, even where the items were not seen in his possession or later recovered. Thus, the evidence, viewed in the light most favorable to the prosecution, was sufficient to lead a rational trier of fact to the conclusion that the essential elements of the crime were proven beyond a reasonable doubt. See *Couzens*, 480 Mich at 244. Therefore, defendant's directed verdict motion was properly denied.

We affirm defendant's convictions and sentences.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens